APPEAL NO. 92119

On February 18, 1992, a contested case hearing was held in _____, Texas, with (hearing officer) presiding as the hearing officer. The hearing officer determined that under the provisions of the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1992) (1989 Act), the claimant's average weekly wage cannot include payments she received from her employer for mileage. Appellant, claimant at the hearing, disagrees with certain findings of fact and conclusions of law and requests that we reverse the decision of the hearing officer and render a decision in her favor, or, in the alternative, reverse the decision and remand the case to the hearing officer for another determination. Respondent, who is the employer's workers' compensation insurance carrier, requests that we affirm the hearing officers' decision.

DECISION

The hearing officer's decision is affirmed.

The parties stipulated that appellant was employed by (employer) on the day of her injury, (date of injury), and that respondent was the employer's workers' compensation insurance carrier on that day. Appellant has been receiving temporary income benefits as a result of her compensable injury. The parties agreed that the issue to be determined at the hearing was whether or not appellant's average weekly wage should include the mileage reimbursement she received from her employer.

Appellant's employer provides in-home health aid and homemaker services to terminally ill patients. Appellant testified that when she was hired in March of 1989, her employer agreed to pay her a base salary of $450 every two weeks plus mileage "to help out on my gas." Her mileage allowance was $0.275 per mile on the date of her injury. As a condition of employment, she said she had to have a car and car insurance. Her job duties required her to care for patients in their homes. On occasion she would have to pick up a prescription and go grocery shopping for a patient. She kept a daily record of her time and mileage and turned in a time and mileage report every week. She said she recorded her mileage "exactly" and it included the mileage from her house to her first patient's house. She further testified that her mileage varied from week to week depending on which patients she visited, that she averaged 1100 to 1200 miles per month, and that her average monthly mileage payment was between $700 and $800. The hearing officer noted at the hearing that there was a problem with the mathematics on this since 1100 to 1200 miles multiplied by $0.275 per mile does not equal $700 to $800. Appellant's attorney "clarified" that appellant's math was "off kilter." Appellant further testified that she owned a car and had car insurance before she was employed, at the time of her employment, and on the date of her injury. At the time of her injury, she said her car payment was $200 per month and her car insurance was between $35 and $37 per month. She also said her car needed maintenance periodically. Appellant further testified that her employer told her that the mileage reimbursement was for fuel. She said, however, that her monthly mileage reimbursement covered her car insurance and part of her car payment. She testified that

if she were sick and could not work she would not be paid for mileage.

Appellant's coworker, JC, testified that the employer pays her at an hourly rate and pays her mileage reimbursement at the rate of $0.275 per mile for the use of her car. She said that if she doesn't drive her car at work, she doesn't get mileage reimbursement. She said that the mileage reimbursement does not include the miles from her house to her first patient's house. She said the mileage starts when she gets to her first patient's house. She also testified that she averages $120 per month for mileage reimbursement and that that does not cover her car payment.

The employer's payroll benefit coordinator testified that she totals an employee's weekly mileage reports at the end of each month and pays the employee for mileage at the rate of $0.275 per mile. She said that mileage from an employee's house to the first employee's first patient's house is not paid for, but that after the employee arrives at the first patient's house the employer pays for mileage for all of the employee's other visits to patients on that day. She also said that it would be possible for an employee to receive a $700 to $800 monthly mileage reimbursement.

Appellant introduced into evidence a brief discussing the inclusion of mileage in wages. Respondent introduced into evidence copies of appellant's 1990 and 1991 W-2 Wage and Tax Statements. Each statement shows an amount in the space provided for "wages, tips, other compensation." There was no testimony as to whether any portion of appellant's payments for mileage was included in those amounts. Respondent also introduced into evidence appellant's time and mileage report for December 26 through December 28, 1990. The report revealed that appellant visited three to five patients each day and recorded a number for "miles" on the line used to record each patient's name.

Appellant disagrees with the following findings of fact and conclusions of law:

Finding of Fact No. 3:Claimant received mileage reimbursement at the State of Texas rate for miles driven each day after arriving at her first patient's residence while furthering employer's business.

Finding of Fact No. 4:Mileage reimbursements received by claimant were less than her automobile expenses.

Conclusion of Law No. 2:Claimant's mileage reimbursement as an employee of [employer] cannot be considered "wages" as that term is defined in Article 8306-1.03(47)(sic).

Conclusion of Law No. 3:Claimant's average weekly wage calculation cannot take into consideration any mileage

reimbursement she received from her employer.

The hearing officer is the trier of fact in a contested case hearing, and is the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given the evidence. Article 8308-6.34(e) and (g). As the trier of fact, the hearing officer resolves conflicts and inconsistencies in the evidence. Garza v. Commercial Insurance Co. of Newark, N.J., 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). When presented with conflicting testimony, the trier of fact may believe one witness and disbelieve others, and may resolve inconsistencies in the testimony of any witness. R.J. McGalliard v. Kulmon, 722 S.W.2d 694, 697 (Tex. 1987).

Pursuant to the 1989 Act, the temporary income benefit of an employee is 70 percent (75 percent for employees earning less than $8.50 per hour) of the difference between the employee's average weekly wage and the employee's weekly earnings after the injury subject to maximum and minimum weekly benefit amounts. Article 8308-4.23. "Wages" include every form of remuneration payable for a given period to an employee for personal services. The term includes the market value of board, lodging, laundry, fuel, and other advantage that can be estimated in money which the employee receives from the employer as part of the employee's remuneration. Article 8308-1.03(47). The Texas Workers' Compensation Commission is given the power and duty to adopt rules as necessary for the implementation and enforcement of the 1989 Act. Article 8308-2.09(a). The Commission has adopted Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 128.1 relating to average weekly wage. Rule 128.1(b) and (c) provide as follows:

(b)An employee's wage, for the purpose of calculating the average weekly wage shall include every form of remuneration paid for the period of computation of average weekly wage to the employee for personal services. An employee's wage includes, but is not limited to:

(1)amounts paid to the employee by the employer for time off such as holidays, vacation, and sick leave;

(2)the market value of any other advantage provided by an employer as remuneration for the employee's services that the employer does not continue to provide, including but not limited to meals, lodging, clothing, laundry, and fuel; and

(3)health care premiums paid by the employer.

(c)An employee's wage, for the purpose of calculating the average weekly wage, shall not include:

(1)payments made by an employer to reimburse the employee for the use of

the employee's equipment or for paying helpers; or

(2)the market value of any non-pecuniary advantage that the employer continues to provide after the date of injury.

Prior to repeal on enactment of the 1989 Act, TEX. REV. CIV. STAT. ANN. Article 8309, Section 1, contained the following provision relating to average weekly wages:

"(4)Said wages shall include the market value of board, lodging, laundry, fuel and other advantage which can be estimated in money which the employee receives from the employer as a part of his remuneration."

From 1917 until 1959, the above provision contained a second provision which immediately followed the first provision and read:

"Any sums, however, which the employer has paid to the employee to cover any special expenses entailed on him by the act of his employment shall not be included."

See Acts 1917, 35th Leg., ch. 103, pt. 4, § § 1 to 6, TEX. REV. CIV. STAT. arts. 5246-82 to 5246-91 (repealed), and TEX. REV. CIV. STAT. art 8309, Sec. 1 (repealed). The second provision of Subdivision 4 of Section 1 of Article 8309 relating to average weekly wages as set forth above was deleted by Acts 1959, 56th Leg., p. 778, ch. 355, § 1.

Prior to the deletion of the second provision of Subdivision 4 of Section 1 of Article 8309, the Supreme Court of Texas in Federal Underwriters Exchange v. Tubbe, 183 S.W.2d 444 (Tex. 1944), applied that provision to the cost or value of transportation furnished by an employer to an employee to and from the places the employee worked, and held that the provision prohibited the inclusion of the cost or value of such transportation in the employee's wages. In Tubbe, the employer transported the employee and its other employees in its trucks to and from the places where they worked. The lower courts had ruled that what it would have cost the employee to furnish his transportation to himself could be considered in determining the employee's wage rate. The Supreme Court of Texas disagreed, holding that the evident intent and meaning of Subdivision 4 of Section 1 of Article 8309 was to expressly prohibit the inclusion (in wages) of the cost or value of the transportation furnished the employee to and from the places where he worked. The court explained that the first provision of Subdivision 4 of Section 1 of Article 8309 defined what, other than money, should be included in wages, and that the second provision was to a certain extent a limitation on the first provision in that it defined what cannot be included in wages. The court reasoned that, if the employer had required the employee to furnish or purchase his own transportation to and from these places, and then reimbursed him for the cost thereof, the sums paid in reimbursement could not be included or counted as wages. The court stated that:

"In such instances the sums paid in reimbursement would be `special expenses' within the meaning of the second provision of this statute. We are unable to reason how a different result could be reached in this case merely because the employer itself incurred the `special expenses' by furnishing the transportation in the first instance . . . ."

Appellant contends that "the fair market value of the advantage included in the mileage payments should be included in the calculation of average weekly wage by proper interpretation of the statutory definition of wages contained in Section 1.02(47) of the current act and proper interpretation of Rule 128.1(b) and (c)." Appellant argues that the court in Tubbe, *supra*, relied explicitly on the second provision of Subdivision 4 of Section 1 of Article 8309 in holding that wages would not include reimbursement for the cost of travel or the value of travel furnished by the employer, and that since that second provision was deleted in 1959 (subsequent to the Tubbe decision in 1944), the "clear implication is that the amended act includes the market value of such advantages, and the new act, using exactly the same language, does also." Appellant also argues that in order to comply with the presumption that administrative regulations are valid, Rule 128.1(c) must not be read to explicitly reinsert the language deleted from the statute in 1959. Appellant also asserts that since the market value of fuel is specifically included (in the definition of "wages" in Article 8309-1.03(47) and in Rule 128.1(b)) payment in cash for fuel and travel should also be included in the term "other advantage."

Respondent argues that appellant's mileage reimbursement is specifically excluded from her wages under Rule 128.1(c) as payments made by the employer to reimburse the employee for the use of the employee's equipment. Respondent also asserts that "if the Legislature had intended upon including amounts for reimbursement into the definition of `wage', the Legislature could have done so," and urges us to apply the common sense, literal interpretation to both the statute and rule.

In our opinion the issue of whether or not to include in "wages" for workers' compensation purposes, payment by an employer to an employee for mileage for use of the employee's personal vehicle in the furtherance of the employer's business affairs in the absence of the former "special expenses" provision of Subdivision 4 of Section 1 of Article 8309 has not been addressed by the Texas courts. In Tubbe, *supra*, the Supreme Court of Texas applied the second provision of Subdivision 4 of Section 1 of Article 8309, which provision was subsequently deleted, in holding that the cost or value of transportation furnished by the employer to the employee would not be included in the employee's wages, and in doing so stated that if the employer had required the employee to furnish or purchase his own transportation, and then reimbursed the employee for such costs, the sums paid in reimbursement could not be included as wages because such sums would be "special expenses" within the meaning of the second provision of the statute. In our view, the court did not expressly or impliedly hold that, but for the limiting language in the second provision of the statute, the cost or value of transportation furnished by the employer to the employee

or reimbursement to the employee for furnishing his own transportation would be included in the employees wages under the first provision of Subdivision 4 of Section 1 of Article 8309.

An agency rule is presumed valid. City of Lubbock v. Public Utility Commission, 705 S.W.2d 329, 330-331 (Tex. App.-Austin 1986, writ ref'd n.r.e.). The burden is upon the person attacking the rule's validity to prove otherwise. Lunsford v. Board of Nurse Examiners, 648 S.W.2d 391, 396 (Tex. App.-Austin 1983, no writ). The general test concerning an agency's statutory authority to promulgate a rule is whether the rule is in harmony with the general objectives of the applicable act. Gerst v. Oak Cliff Savings & Loan Association, 432 S.W.2d 702 (Tex. 1967). In discussing the purpose of the prior workers' compensation law, the courts stated that the purpose of the law was to provide for a speedy, equitable relief for the benefit of an employee injured in the course of his employment. *See* Texas Employers' Insurance Association v. Wright, 128 Tex. 242, 97 S.W.2d 171 (1936); Seale v. American Motorist Insurance Company, 798 S.W.2d 382, 390 (Tex. App.-Beaumont 1990, no writ). We believe the 1989 Act has a like purpose and that Rule 128.1(c)(1) is consistent with that purpose. In our opinion, the mileage payments paid to appellant constituted payments made by the employer to reimburse appellant for the use of appellant's equipment, *i.e.*, her car, and such payments are not to be included in appellant's wage under the provisions of Rule 128.1(c)(1). We recognize that part of the mileage payment would most probably be for the purpose of reimbursing appellant for fuel she used in her car while in the furtherance of the affairs of her employer. The market value of fuel is expressly included in the definition of "wages" by statute and rule. However, if indeed fuel as used in these provisions includes gasoline as opposed to fuel used to cook or heat as in regular homemaking, appellant never attempted to demonstrate what portion of the mileage payment represented reimbursement for fuel, but instead insisted that all amounts paid for mileage were includable in her wages. It has been held that the burden of proof is upon the claimant to offer competent evidence to establish his or her average weekly wage. Texas Employers' Insurance Association v. Bragg, 670 S.W.2d 712 (Tex. App.-Corpus Christi 1984, writ ref'd n.r.e.). Inasmuch as the appellant offered no evidence at the hearing of the fuel component of her mileage reimbursement payment, presupposing it could be properly included in the wage determination, we believe an adjustment to her wage for the market value of fuel would not be justified in this case.

The decision of the hearing officer is affirmed.

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Robert W. Potts
Appeals Judge

CONCUR:

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

_____
Joe Sebesta
Appeals Judge